IB Builders Sdn Bhd v Kheng Bee Co Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS D-02(1M) (NCVC)-616–04 OF 2014 AND D-02(NCVC)(W)-998–06 OF 2014
ABDUL AZIZ AB RAHIM, MAH WENG KWAI JJCA AND PRASAD ABRAHAM J
21 JANUARY 2015

Land Law — Charge — Fixtures — Parties entered into project to implant mild steel sheet piles — Project abandoned later — Attempt to remove fixtures but refused by previous and present land owners — Whether piles were fixtures that could be removed and taken out of land — Appeal against decision of High Court in dismissing application to amend defence after completion of trial

This was an appeal against the decision of the High Court judge in dismissing the application of the appellant in to amend its defence after the completion of the trial and recording of evidence to include a plea of limitation. The respondent's claim arose from the driving implanting of mild steel sheet piles ('the MS sheet piles') in respect of a project for Syarikat Sedawan Properties (M) Sdn Bhd ('Sedawan'), which was a company in liquidation on the said land. This project was abandoned and the plaintiff attempted to remove the MS sheet piles from the said land but the previous land owner had refused the respondent access to remove the MS sheet piles back. The appellant, as the present landowner, followed in the same vein. The respondent was seeking a declaration that the mild steel sheet piles driven into Lots 125 and 524 on the project site of Sendawan was not a fixture to the said land and belonged to the respondent. The project had been abandoned and the contractor had been wound up. The appellant bought the said land at a public auction and contended that the MS sheet piles in question were fixtures to the said land and the respondent was not entitled to the same. The appellant's arguments were that there were inordinate delay and no explanation afforded for the same in the affidavit in support; it took one year after the case was set down for trial for the appellant to file this application; even taking into account the present solicitors had taken over conduct of the matter five months before the trial, there was still a delay; and that the application was filed in bad faith principally to get the trial adjourned.

Held, dismissing the appeal with costs:

(1) The High Court judge had not erred in the exercise of his discretion in dismissing the said application as His Lordship had given due consideration to the application and the affidavit in support. As long as

A the mild steel sheet piles could be removed without damaging the said land and brought in purely for the purpose of the said contract, it would not be regarded in law as a fixture (see paras 2 & 8).

(2) Since the decision of the judge was an exercise of discretion, there was no reason to intervene as the discretion was exercised on correct principles. The amendment being sought to include a plea of limitation would be useless and non-effectual (see para 3).

(3) Limitation had not set in as the act of refusing the respondent access to the MS sheet piles accrued from the date of refusal by the appellant to release the MS sheet piles to the respondent. The proposed amendment was without basis as the act of refusing the respondent to take possession of the MS sheet piles which were not affixed on to the land was a cause of action between the respondent and the appellant and limitation had not set in as it accrued in 2012 (see para 5).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi dalam menolak permohonan perayu untuk meminda pembelaannya selepas selesai perbicaraan dan merekod keterangan untuk memasukkan pli had masa. Tuntutan responden berbangkit daripada penanaman cerucuk keping keluli lembut ('cerucuk keping KL') berkaitan projek untuk Syarikat Sedawan Properties (M) Sdn Bhd ('Sedawan'), yang mana adalah syarikat dalam likuidasi atas tanah tersebut. Projek ini ditinggalkan dan plaintif mencuba untuk mengalihkan cerucuk keping KL daripada tanah tersebut tetapi pemilik tanah terdahulu enggan memberi akses kepada responden untuk mengalihkan semula cerucuk keping KL tersebut. Perayu, sebagai pemilik tanah sekarang, mengikut langkah yang sama. Responden memohon untuk perisytiharan bahawa cerucuk keping KL yang ditanam ke dalam Lot 125 dan Lot 524 di tapak projek Sendawan bukan lekapan kepada tanah tersebut dan dimiliki oleh responden. Projek tersebut telah ditinggalkan dan kontraktor telah digulung. Perayu membeli tanah tersebut di lelongan awam dan berhujah bahawa cerucuk keping KL yang dipersoalkan adalah lekapan kepada tanah tersebut dan responden tidak berhak kepadanya. Hujahan perayu adalah bahawa terdapat kelewatan terlampau dan tiada penjelasan yang diberikan mengenainya dalam afidavit sokongan, ia mengambil satu tahun selepas kes dibicarakan untuk perayu memfailkan permohonan ini; walaupun mengambil kira peguam sekarang telah mengambil alih menjalankan perkara tersebut lima bulan sebelum perbicaraan, terdapat kelewatan; dan bahawa permohonan terutamanya difailkan dalam niat jahat untuk membuatkan perbicaraan tertangguh.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim Mahkamah Tinggi tidak tersilap dalam pelaksanaan budi

bicaranya dalam menolak permohonan tersebut memandangkan Yang Arif telah memberikan pertimbangan yang wajar kepada permohonan dan afidavit sokongan. Asalkan cerucuk keping KL boleh dialihkan tanpa merosakkan tanah tersebut dan dibawa masuk semata-mata untuk tujuan kontrak tersebut, ia tidak akan dianggap dari segi undang-undang sebagai lekapan (lihat perenggan 2 & 8).

(2) Memandangkan keputusan hakim adalah pelaksanaan budi bicara, tiada sebab untuk campur tangan kerana budi bicara dilaksanakan atas prinsip yang betul. Pindaan yang dipohon untuk memasukkan pli had masa akan menjadi tidak berguna dan tidak efektif (lihat perenggan 3).

(3) Had masa belum 'set in' kerana tindakan enggan memberi akses kepada responden kepada cerucuk keping KL terakru dari tarikh keenganan perayu melepaskan cerucuk keping KL kepada responden. Pindaan yang dicadangkan adalah tanpa asas kerana tindakan tidak membenarkan responden untuk mengambil milikan terhadap cerucuk keping KL yang mana bukan lekapan ke atas tanah adalah kausa tindakan antara responden dan perayu dan had masa belum lagi set in kerana ia terakru pada tahun 2012 (lihat perenggan 5).]

Notes

For a case on fixtures, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2647.

Cases referred to

Billing v Pill [1953] 2 All ER 1061 (refd)

Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors [1994] 1 MLJ 740; [1993] 1 LNS 103 (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Ponnusamy & Anor v Nathu Ram [1959] 1 MLJ 228 (refd)

Appeal from: Suit No MT(1)-22-NCVC-181–11 of 2012 (High Court, Kota Bharu)

Mohamed Ibrahim Mohamad (Ibrahim & Fuadah) for the appellant.
Zainal Abidin bin Mustaffa (Zainal & Mariani) for the respondent.

Prasad Abraham JCA:

[1] This was an appeal from the decision of the learned judge in dismissing the application of the appellant in (D-02(IM) NCVC-616–04 of 2014) to amend its defence after the completion of the trial and recording of evidence to include a plea of limitation.

[2] We found the learned judge had not erred in the exercise of his discretion in dismissing the said application. The learned judge had given due consideration to the application and the affidavit in support and found the following reasons for the dismissing the application ie:

(a) inordinate delay and no explanation afforded for the same in the affidavit in support;

(b) it took one year after the case was set down for trial for the appellant to file this application;

(c) even taking into account the present solicitors had taken over conduct of the matter five months before the trial, there was still a delay; and

(d) the application was filed in bad faith principally to get the trial adjourned.

[3] We are the view that since the decision of the learned judge was an exercise of discretion, we find no reason to intervene as the discretion was exercised on correct principles. The amendment being sought to include a plea of limitation would be useless and non-effectual (see *Ponnusamy & Anor v Nathu Ram* [1959] 1 MLJ 228).

[4] For the aforesaid reasons, we dismissed the appellant's appeal and reserved costs to be determined in the appeal proper. As to the part of limitation, being a ground to allow that amendment, looking at (B9 of the appeal record), the proposed plea of limitation is found set-out therein. The claim of the respondent arises from the driving implanting of mild steel sheet piles ('the MS Sheet Piles') in respect of a project for Syarikat Sedawan Properties (M) Sdn Bhd (a company in liquidation) on the said land. This project was abandoned and the plaintiff attempted to remove the MS Sheet Piles from the said land but the previous land owner had refused the respondent access to remove the MS Sheet Piles back. On the 3 August 2012, the present landowner ie the appellant followed in the same vein.

[5] It is the judgment of this court that limitation had not set in as the act of refusing the respondent access to the MS Sheet Piles accrues from the date of refusal by the appellant to release the MS Sheet Piles to the respondent ie (appeal record p 13 para 5 of the statement of claim). It is our view that the proposed amendment is without basis as the act of refusing the respondent to take possession of the MS Sheet Piles which were not affixed on to the land was a cause of action between the respondent and the appellant and limitation had not set in as it accrued in 2012.

[6] With regards to the appeal proper in D-02(NCVC) (W)-998–06 of 2014, the order appealed against is found in (p 1 *rekod rayuan tambahan*

Bahagian A) and the grounds of judgment of the learned judge found in (pp 3–10 of the same volume of the record of appeal). A

[7] The respondent was seeking a declaration that the mild steel sheet piles driven into Lots 125 and 524 on the project site of Sendawan Properties Sdn Bhd was not a fixture to the said land and belonged to the respondent. The project had been abandoned and the contractor had been wound up. The appellant bought the said land at a public auction and contends that the MS Sheet Piles in question were fixtures to the said land and the respondent was not entitled to the same. B C

[8] We agree with the learned judge, that as long as the mild steel sheet piles could be removed without damaging the said land and brought in purely for the purpose of the said contract, it will not be regarded in law as a fixture (see *Billing v Pill* [1953] 2 All ER 1061 and *Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740; [1993] 1 LNS 103). We refer also to *National Land Code A Commentary* (2nd Ed), by Judith Sihombing at p 108 and we quote: D

> There is no distinction made in the Code between fructus industrials and fructus naturales: see *Marshall v Green*. Paragraph (d): Where movables or chattels have been so affixed to land or to buildings on the land with the intention that it is to become part of the land, the chattel loses its nature as a movable and becomes an immovable or fixture and thus land. The English law of fixtures which applies in Peninsular Malaysia maintains that: E
>
> > ... articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lies on those who contend it is a chattel. F G

[9] The burden of proving that the MS Sheet Piles were no longer chattels but fixtures on the said land was on the appellant. The appellant through its counsel elected to submit no case to answer at the close of the respondent's case (see *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509), a decision of the supreme court and we refer to the judgment of Gopal Sri Ram JCA (as he then was) at p 528 and we quote: H I

> The rule of procedure, which requires these steps to be followed, is not a mere formality but one of essential justice. For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

A In this context it is sufficient to refer to the following passage in the judgment of Elphinstone CJ *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. *At this stage the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true*. (Emphasis added.)

B

C **[10]** It therefore follows, the respondent's evidence is accepted as correct, and the respondent had discharged their burden of proving the same were chattels.

D **[11]** The respondent had adduced evidence both oral and documentary to prove its case. By electing to submit no case to answer, bearing in mind the burden that rests on the appellant, the learned judge was correct in finding for the respondent. We accordingly dismissed the appeal with costs.

E *Appeal dismissed with costs.*

Reported by Afiq Mohamad Noor

F

G

H

I